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72-530

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In The

Supreme Court of the United States

October Term 1972

No. 72-530

MORTIMER G. LEVINE,

Petitioner,

- and -

ROYAL E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

- against -

THE LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

Supreme Court of the United States

OCTOBER TERM 1972

No. ___

MORTIMER G. LEVINE,

Petitioner,

and

ROYALE E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

vs.

THE LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Mortimer G. Levine, plaintiff-appellant below, petitioner for a writ of certiorari to review the order of the Court of Appeals of the State of New York, dated July 6, 1972, filed in the office of the Clerk of the County of Nassau, State of New York, on September 11, 1972.

Opinions Below

The unreported opinion of the Supreme Court of the State of New York, County of Nassau is printed in the appendix, commencing at page 1a. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department is reported at 38 A.D.2d 936, and is printed in the appendix at page 18a. The order of the Court of Appeals of the State of New York, which affirmed the Appellate Division without opinion, yet unreported, is printed at 25a.

Jurisdiction

This Court's jurisdiction is based on 28 U.S.C. §1254(1).

Question Presented

May a public benefit corporation, designated as a "state agency" by the State Legislature, impair the obligations of its own contracts, without any showing that the impairment was necessitated in the furtherance of public health and morals or in the furtherance of the vital interests of the people of the state?

The Court of Appeals of the State of New York held in the affirmative.

Constitutional Provision and Statutes

Article 1, Section 10 of the Constitution:

> "No state shall ... pass any ... law impairing the obligation of contracts...."

N.Y. Publi thorities Law:
Article 5, Title 11
Section 1263
Section 1264
Section 1265
Section 1266(5)
Section 1266(8)

N.Y. Public Service Law:
Section 5
Section 5-C
Section 66(5)

Statement of the Case

This is a consolidated class action for a declaratory judgment against respondents, The Long Island Rail Road Company (hereinafter LIRR) and Metropolitan Transportation Authority (hereinafter MTA), to require LIRR to honor its ten-trip discount tickets in accordance with the terms of its ticket contracts.

The terms and conditions of the ten-trip contracts of carriage of LIRR are printed on the face of the tickets as follows:

> "Good for use by Bearer and Persons Accompanying Bearer. Ten continuous rides in either direction within ONE YEAR in

addition to date of sale stamped on back. Fares paid in the absence of this ticket will not be refunded. Subject to regulations" (30).[1]

LIRR is a wholly owned subsidiary of MTA (60).

MTA was created by the New York Legislature under Article 5, Title 11 of the Public Authorities Law, a public benefit corporation (Sec. 1263) designated as a "state agency" (Sec. 1263), to continue and develop transportation facilities in the metropolitan area of New York (Sec. 1264). MTA was removed from the jurisdiction of the New York Public Service Commission (Sec. 1266[8]) and was empowered to acquire subsidiaries establish fares and regulations for itself and its subsidiaries (Sec. 1265-1266). As provided by Section 1266(5), the directors or members of LIRR are the same persons holding similar office of MTA.

It is undisputed that during at least the past three decades, following the many fare increases granted to LIRR (111) by the New York Public Service Commission and later by MTA, LIRR continued without interruption or restriction to sell its ten-trip tickets and up to the fare increase

1. Unless otherwise indicated, parenthetical numerical references are to the pages of the Record on Appeal.

of January 21, 1972, LIRR accepted the ten-trip tickets for the rides as specified on the tickets until the expiration of the one year period, despite the intervening fare increase (26-27).

On December 30, 1971, the president of LIRR wrote to MTA, stating LIRR projected a deficit for 1972, and accordingly requested certain fare increases including the elimination of future sales of the ten-trip ticket (60-61). The request for relief by LIRR did not seek a reduction of the term of previously issued ten-trip tickets (64-65). Thus no notice was given that consideration would be given at the hearing to such reduction of term (136-137, 144-145).

On January 17, 1972, MTA held a public hearing on the fare change requested by LIRR (61) and on January 21, 1972, announced its fare increase plan (96-99). Apparently on its own initiative and without request by LIRR, MTA directed the Railroad to stop honoring ten-trip tickets presented for transportation after March 1, 1972 (61).

In the interim between LIRR's fare increase application and MTA's directive to dishonor the ten-trip discount tickets, LIRR continued to sell such tickets to the public, with the representation of validity for passage for one year after the purchase, unamended and unaltered (130-131). Although it is indicated that 40,000 passengers utilized ten-trip tickets each weekday (130) the record is barren as to the number of such tickets purchased during the interim period or the amount paid in advance and retained by LIRR for such ten-trip tickets, which varied in price from ap-

proximately $10 to $40. There having been no public hearing on the proposal to curtail the term of the ticket contract, the number of tickets sold and the amounts paid therefor are within the sole knowledge of the respondents, as is the amount the State of New York, through respondents, intended to salvage or gain by their failure to perform the obligations as set forth on the ten-trip tickets.

On February 29, 1972, the Supreme Court, Nassau County rendered a decision (1a to 18a) granting an injunction restraining LIRR from refusing to honor the unexpired and unused ten-trip tickets (18a).

On appeal by LIRR and MTA to the Appellate Division, Second Department, that court substantially modified the judgment of the Supreme Court, Nassau County, the equivalent of reversal of the judgment, to the extent that the respondents were enabled to cease honoring the ten-trip tickets despite the terms of the ticket contract (19a). On appeal by petitioner to the Court of Appeals that Court, on July 6, 1972, unanimously affirmed the order of the Appellate Division, which had held, as asserted in its opinion (18a - 25a), that LIRR's ten-trip ticket contract could be abrogated by its parent public benefit corporation, MTA.

Reasons for Granting the Writ

I.

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT ON THE QUESTION OF IMPAIRMENT OF STATE CONTRACTS.

The affirmance by the Court of Appeals of the holding of the Appellate Division, Second Department, that a state authority may repudiate the obligation of its contracts without compensation to the injured parties, is in direct conflict with the decisions of this Court pertaining to the contract clause of the Constitution (Fletcher v. Peck, 10 U.S. [6 Cranch.] 87, 137-138 [1810]; Sinking Fund Cases, 99 U.S. 700, 719 [1878]; Lynch v. United States, 292 U.S. 571 [1933]; Perry v. United States, 294 U.S. 330 [1934]).

In 1933 in Lynch v. United States (supra) this Court affirmed its prior holdings with respect to state contractual obligations when it said:

> "Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual ob-

> ligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking Fund Cases, 99 U.S. 700, 719, 25 L. Ed. 496, 501" (supra, at 580).

A year after Lynch, in Perry v. United States (supra) this Court restated its position with respect to governmental contractual obligations and more particularly the pledge of the State to repay money:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers [supra, at 350-351).
>
> * * *
>
> "To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the

> pleasure and convenience of the pledgeor. This Court has given no sanction to such a conception of the obligatons of our Government" (supra, at 351).

Up to its decision in the case at bar, the Court of Appeals of the State of New York had long adhered to the aforementioned principle, having said in McMaster v. The State of New York, 108 N.Y. 542, 555 (1888):

> "The state was bound by its contracts just as an individual would have been bound. It might violate them, but could not repudiate or destroy the obligation of them."

Thus in the case at bar, the State of New York could not repudiate its obligation to carry passengers during the one year period it had agreed upon for the advance price paid to it, the equivalent of borrowing from its passengers for a future repayment in the form of transportation. The directive of MTA to return the money paid by passengers, without fulfilment of the obligation of transportation and permitting the demand of a higher price for the contracted rides is a clear repudiation of a government contractual obligation.

This Court has held that the only circumstances under which a state may impair its own contracts are by act of Congress or legislature in furtherance of the police power of the state in only the following instances:

(a) in matters affecting public health and public morals (Beer Company v. Massachusetts, 97 U.S. 25 (1877); Stone v. Mississippi, 101 U.S. 814 (1879); and

(b) in matters requiring the safeguarding of the "vital interests" of the people (City of El Paso v. Simmons, 379 U.S. 497, 515, 516 (1964); Atlantic Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548 (1913).

The facts in the case at bar do not come within the scope of the exceptions denoted in the foregoing cases.

None of the cases relied on by the Appellate Division[2] in striking down the instant contracts involved contracts to which the state was a party.

In short, LIRR here was faced with a deficit. Its parent therefore, as required by Section 1266 of the Public Authorities Law, held a hearing to increase fares and eliminate future sales of the ten-trip tickets. Such actions were sanctioned by the statutory authority of MTA. However, MTA transgressed constitutional restrictions, when it also abrogated its existing ten trip ticket contracts, "in the attempt to lessen government expenditure ... not the practice of economy, but an act of repudiation" (Perry v. United States, supra, at 352-353).

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2. Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372; Jones v. Rochester Transit Corp., 92 N.Y.S.2d 735, aff'd 237 App. Div. 939; Clute v. Nassau & Suffolk Light Co., 118 Misc. 630; Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 392; Matter of Department of Bldgs. of City of New York (Philco Realty Corp.), 14 N.Y.2d 291; Guttag v. Shatzkin, 230 N.Y. 647.

If the Court of Appeals' affirmance of the order of the Appellate Division is permitted to stand, the door will be opened in New York, if not in all other states to all state agencies, including all of the proliferating public authorities, to impair and repudiate their own contracts without even a showing that such impairment is in the vital public interest.

II.

THE DETERMINATION OF THE COURT OF APPEALS APPEARS TO HAVE BEEN FOUNDED ON TWO ERRONEOUS CONCEPTS POSTULATED BY THE APPELLATE DIVISION.

In formulating its finding that MTA could impair its own contracts of carriage, the Appellate Division found (A) that the Public Service Commission had the power to impair a fare contract to which the state was a party (24a) and (B) that MTA succeeded to the powers of the Public Service Commission (21a).

A.

If Congress could not relieve the United States from the fulfilment of its contractual obligations (Lynch v. United States, supra; Perry v. United States, supra), then most certainly the Public Service Commission could not exculpate the State of New York or its agents, LIRR and MTA, from the fulfilment of such obligations.

B.

Assuming arguendo that the Public Service Commission had the power to impair state contracts in addition to its conceded power to impair private contracts within its jurisdiction, such powers were not "extended to MTA," as asserted by the Appellate Division (21a).

The Public Authorities Law did not extend the Commissions' powers to MTA. It merely removed MTA from the jurisdiction of the Commission. Section 1266(8) provides as follows:

> "The jurisdiction, supervision, powers and duties of the Public Service Commission or of the Department of Public Service of the state under the Public Service Law shall not extend to the authority in the exercise of any of its powers under this title" (underscoring added).

It is inconceivable that the Legislature contemplated endowing MTA, a state corporation, created to furnish transportation facilities, with the same powers and duties as the Public Service Commission, characterized by the New York Court of Appeals as "a superintending agency of government" (People ex rel. City of New York v. Nixon (229 N.Y. 356, 359; 128 N.E. 245 [1920]). The Public Service Commission was empowered by statute with quasi-judicial powers to fix rates, supervise business practice and formulate safety regulations of privately owned corporations furnishing utility and transportation services to the public (Public Service Law, Sec. 5). It did not have jurisdiction over publicly owned transit facil-

ities (Public Service Law, Sec. 5-c). The Public Service Commission would have had no occasion or authority to enter into contracts with the public and thus did not and could not impair its own obligations as MTA sought to do here.

Moreover, the Public Service Commission was specifically delegated in its enabling act, the Public Service Law, to set rates and charges notwithstanding contrary contracts entered into by the transit and utility companies under its supervision. Section 66(5) in this respect reads as follows:

> "... the commission shall determine and prescribe in the manner provided by and subject to the provisions of section seventy-two of this chapter the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished notwithstanding that a higher or lower rate or charge has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement...."

On the other hand MTA has no regulatory powers over others. It is a business corporation, albeit state owned, organized to furnish services to the public. Like any other private corporation, not under the supervision of the Public Service Commission, it has the right to fix its and its subsidiaries' rates and charges for the services they dispense (Public Authorities Law, Sec. 1266), with one limitation, the prerequisite of a public hearing. No more than the charters of private

corporations contain such proviso, the Legislature has not given MTA the power to impair its contracts.

MTA, just as unregulated private corporations, who fix their own rates for services, may not impair their own service contracts entered into prior to a self-imposed rate rise.

It is repugnant concept which would countenance a state business authority to enter into executory contracts which could be impaired or repudiated at its own determination. Even had the Legislature specifically delegated to MTA the right of repudiating state contracts, its determination would have been unconstitutional unless there were a showing, as is here absent, that it was in the vital public interest (El Paso v. Simmons, supra, pp. 515-516).

Conclusion

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted

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Opinion of J. Suozzi, J.

SUPREME COURT : NASSAU COUNTY
SPECIAL TERM : PART 1

Index No. 1204/72
1/27/72

By: Suozzi, J.
Dated: February 29, 1972

- -x

MORTIMER G. LEVINE, ROYAL E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

vs.

THE LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

- -x

By separate show cause orders, plaintiffs Levine and Blakeman have sought temporary injunctions to restrain the Long Island Railroad (hereinafter LIRR) from refusing to honor unused ten-trip tickets during the pendency of actions for a permanent injunction.

Opinion

Inasmuch as the action of the LIRR which the plaintiffs sought to enjoin would not occur until March 2, 1972, this Court has withheld the relief of a temporary injunction in contemplation of a decision on the merits of the actions prior to March 2, 1972. In the meantime, the LIRR has agreed to keep a record of any and all holders of ten-trip tickets who have sought and obtained a refund and to provide them with a receipt to redeem such tickets in the event of a decision favorable to plaintiffs. The defendants have cross-moved for a dismissal of the complaints on the grounds they do not state a cause of action.

Upon its own motion and the consent of the parties, this Court has consolidated the two actions; and in the interest of avoiding a multiplicity of similar show cause orders and actions, this Court has permitted the joinder of other persons as plaintiffs and the filing of briefs as amicus curiae so that all possibly affected persons and their respective contentions would be before the Court.

In accordance with this procedure, the following additional persons have been joined as plaintiffs and the titles of the actions amended accordingly: Martin M. Greenberg, Henry Mittler. Briefs as amicus curiae have been received from the County Attorney of Nassau County in behalf of said County, the law firm of Hatfield, Brady and Taft, besides the briefs for the plaintiffs Levine, Blakeman, and Greenberg and the defendants.

At the outset the Court concludes that a class action is appropriate insofar as declarative relief is sought.

Opinion

In Gaynor v. Rockefeller (15 N.Y.2d 120, 129-230), the Court in denying the right of plaintiffs to bring a class action said that where an "individual claim might be subject to defenses not available against others; and, in general, determination of the merits of each claim would turn on the particular facts and circumstances involved" the class action could not be maintained. Such a situation does not exist here where the rights of each ticket holder depend entirely upon the same claim that the defendant cannot change the rules with respect to the ten-trip tickets heretofore purchased and, thereby, abridge the obligations of the contract between said purchasers and the defendant railroad.

In relation to this motion to dismiss, the Courts in this State have followed the rule in a declaratory judgment action that on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the Court to make a declaratory judgment and not whether the plaintiff is entitled to a declaration favorable to him (Law Research Service v. Honeywell Inc., 31 A.D.2d 900; Lanza v. Wagner, 11 N.Y.2d 317; Rockland Light and Power Co. v. City of New York, 289 N.Y. 45). Since a declaration does appear necessary as to the rights and obligations and remedies of the parties, the motions to dismiss are denied.

The undisputed facts herein which constitute the factual background to this litigation are as follows: the LIRR is and has been since January 20, 1966,

a wholly owned subsidiary corporation of the Metropolitan Transportation Authority (hereinafter MTA). On December 30, 1971, the Railroad's President reported to the MTA a projected operating deficit for 1972 of 52 million which would be reduced to a 10.4 million deficit if the "save-the-fare" legislation pending in Albany was enacted. To meet the projected deficit certain fare increases and the elimination of the ten-trip ticket were requested. The justification for the elimination of the ten-trip ticket as stated in the request was that it "has been difficult to administer and has been employed in a number of various methods to defraud the Railroad" and "it has been very costly to the Railroad's revenues."

On January 21, 1972, following a public hearing held on January 17, 1972, on the fare changes requested by the Railroad, the MTA announced that it approved, as modified by it, a fare restructuring plan requested by the Railroad. This plan as approved by MTA directed the Railroad to stop honoring ten-trip tickets presented for transportation after March 1, 1972. This direction was stated as follows:

> "Ten-trip tickets issued prior to the effective date of these Fare Schedules will be honored only until midnight of the 1st day of March, 1972, after which, upon application, refunds will be made on the basis of the price of the tickets prorated to reflect the number of tickets punched."

Opinion

The following explanation for this action was given:

> "We recognize that this will be a hardship to those who ride the railroad three days or less per week, but we do not think there is any real choice. The fact is that the 10 trip ticket is difficult to administer, has been abused, and is very costly to the railroad's revenues."

The statement in one of the moving affidavits to the effect that "approximately 40,000 passengers utilize these tickets each weekday" has not been disputed and is, accordingly, accepted at face value for the purpose of this determination.

It also appears that aside from any purchases of ten-trip tickets which may have been made prior to the Railroad's request to the MTA for the elimination, purchases were made subsequent to this request and presumably up to the time the MTA approved the request and directed the Railroad to refuse to honor 10 trip tickets after March 1, 1972. The number of tickets or purchases affected by this direction is not disclosed. The projected loss to the Railroad in increased revenue if the Railroad is required to honor the unused ten-trip tickets within a year of their purchase has not been disclosed. The response by the defendants' attorneys to an inquiry by the Court as to this loss suggests that this loss is not capable of accurate computation from the fiscal records maintained by the Railroad as to

these tickets. The ten-trip tickets offered for sale by the defendant prior to the elimination thereof contained the following language:

> "Good for use by Bearer and Persons Accompanying Bearer. Ten continuous rides in either direction within One Year in addition to date of sale stamped on back. Fares paid in the absence of this ticket will not be refunded. Subject to regulations."

From the record, this Court has also reasonably inferred and assumed for the purpose of this determination that the passengers had no choice in the form of the ten-trip ticket sold or voice in the preparation of the ticket and the inclusion of the printed material therein, and that the railroad has included similar language and particularly "one year in addition to date of sale stamped on back" for many years both before and since the creation of the MTA.

Although the complaints herein have not raised the issue, on the motions plaintiff has questioned the reasonableness and the basis of the total elimination of the ten-trip ticket. This question is not now before this Court. In any event in the absence of a transcript of the public hearing which conceivably may disclose the factual basis for the railroad's request and the MTA's modified approval, the Court could properly consider this issue, assuming it had the power to do so. The constitutionality of the legislation creating the MTA has been established as has the implementation of its powers as a valid exercise of legis-

lative authority. (City of Rye v. Metropolitan Transportation Authority, 24 N.Y.2d 627.) The broad scope of the powers entrusted to the MTA are readily apparent from a plain reading of the enabling enactments and the judicial determinations which have construed them. (Article 5, Title 11 of the Public Authorities Law & 1260 et seq., County of Nassau v. MTA and LIRR, 57 Misc.2d 1025, aff'd, 32 A.D.2d 647.) Therefore this Court will not substitute its judgment for the MTA on this issue.

The main thrust of the challenge is directed to that portion of the MTA's modified approval of the LIRR's request for a fare-structure change which directs the LIRR to refuse to honor unused ten-trip tickets after March 1, 1972 notwithstanding the non-expiration of the time limit stamped on said tickets. By these actions the plaintiffs seek declaration of their rights and of those persons for whom these actions are brought and an injunction to restrain the LIRR from refusing to honor the unused and outstanding tickets after March 1, 1972 as it has been directed to do by the MTA.

The various plaintiffs have urged several grounds as the basis for the relief sought herein. The first of them is that the MTA's modification of the railroad's request to eliminate the ten-trip ticket which directed the railroad not to honor any outstanding tickets as of March 2, 1972 exceeded the railroad's request and is invalid and unenforceable because no public hearing was held as to this proposed modification.

Opinion

The defendants do not dispute the MTA's modification of the railroad's request was more than the railroad had requested. However it is their contention that the MTA's broad powers authorize the modification even in the absence of its discussion at a public hearing.

Concurrently with the creation of the MTA, the LIRR became a wholly owned subsidiary of the MTA. Simultaneously, the railroad was removed from the jurisdiction of the Public Service Commission and the MTA succeeded to the powers previously vested in the Public Service Commission to establish and change rates after a public hearing. Section 1266(3) which invested the MTA with these special powers provides in part that

> "Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be established and changed only if approved by resolution of the authority adopted by not less than a majority of the whole number of members of the authority then in office and only after a public hearing,...."

It is sufficiently clear from the record before this Court, even in the absence of a transcript of the public hearing that the public hearing was convened specifically to deal with the requests for new fare structure as submitted by the railroad. There is nothing in the record from which it can be reasonably inferred that any public hearing was ever convened or that the public

hearing that was held to consider the railroad's request was adjourned to consider the modifications made by the MTA as to the ten-trip ticket which enlarged or exceeded the railroad's requests. It is not apparent to this Court either from the language of the statute or its legislative history that in substituting the MTA for the Public Service Commission that the Legislature intended to invest it with greater authority over the establishment and change of fares for the LIRR than that previously held by the MTA's predecessor. By its grant of power the Commission was empowered to establish the fares below those requested by the railroad but not to increase the fares in excess of the railroad's request. As the Commission was not authorized to grant to railroad more than it sought, the MTA is similarly restricted. By its modified approval of the railroad's request by directing the railroad to refuse to honor the outstanding ten-trip tickets the MTA enlarged the railroad's request and thereby approved a change which effectively is in excess of the change sought by the railroad. In this Court's view such an enlargement of the railroad's request was not within the purview of the MTA's power in the absence of a public hearing to consider this enlargement.

The failure to comply with the provision of the statute which mandates a public hearing on any change to be approved by the MTA, in this Court's view, would invalidate the MTA directive and render it unenforceable.

Opinion

The remaining grounds urged by the plaintiffs deal with more substantive issues which merit consideration and disposition notwithstanding the deficiency arising from a failure to hold a public hearing on the MTA's modification of the railroad's request.

The plaintiffs contend that the outstanding unused tickets with respect to which the one year period has not expired constitute legally binding contracts which the railroad is obligated to honor until the one year period expires and the MTA's direction to the railroad not to honor them violates the constitutional provisions against the impairment of contractual obligations by this State. (Article 1, Sec. 10[1] of the U.S. Constitution.)

In opposition to these contentions, the defendants' attorney urge that assuming without conceding that upon the purchase of a ten-trip ticket the railroad made a contract with the bearer, this contract was subject to the inherent power of the State exercised through the Public Service Commission and in this case through the MTA to alter such a contract without violating the aforesaid constitutional guaranty. To support these contentions the defendants rely on Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372; Jones v. Rochester Transit Corporation, 92 N.Y.S.2d 735 (City Court of Rochester, 1949), aff'd, 277 A.D. 939, rearg. and leave to appeal denied, 277 A.D. 962.

In Union Dry Goods Co. v. Georgia Public Service Corporation, supra, the defendant had contracted in writing to supply plaintiff with

electric light and power at stipulated rates for five years. Within the contract period plaintiff refused to pay the higher rate authorized and approved by the Railroad Commission of Georgia. The plaintiff was required to pay the higher rate, notwithstanding the contract rates, by the Supreme Court holding therein which upheld the defendant and stated as follows:

> "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in Manigault v. Springs, 199 U.S. 473, 480, it was declared that:
>
> > 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected'" 248 U.S. at p. 375.

In the Jones case the plaintiff sued to recover damages, after a bus fare raise became effective, because of the defendant's refusal to honor a token purchased by the plaintiff before the raise became effective. The plaintiff's complaint was dismissed on the grounds that the contract "was subject to the inherent right of the State of New York, the Public Service Commission, to change the terms

of the contract, particularly in respect to the consideration to be paid by the public, including plaintiff for the defendant's services."

More simply stated, the defendants' contention is that the time limit imprinted on the ten-trip tickets is rendered meaningless and railroad's contractual obligations are terminated by the MTA's exercise, as the instrumentality of the state, of the state's inherent right to alter contracts of carriage. The defendants further argue that the fact that there is a time limit on the use of the tickets which was not the case with the tokens involved in the Jones case does not render the principle of that case inapplicable here. To support this contention they rely on Union Dry Goods Co. v. Georgia Public Service Corporation, supra, where the existence of a contract for a specified period did not inhibit the U.S. Supreme Court on the basis of the "inherent right of the state to alter contracts" principle from approving an increase in the rates during the unexpired term of the contract.

From these authorities cited and relied on by the defendants, it is apparent that the inherent right of the state to alter contracts of carriage, was clearly stated and defined by the U.S. Supreme Court as early as 1918 and the Courts of this State in the Jones case as early as 1949. This right, as the defendants' attorneys have so correctly and often pointed out, is too well-established to merit much discussion.

Opinion

It is so well known as to be almost axiomatic that everyone is presumed to know the law. This presumption of the knowledge of the law aside, it would strain the credulity of this Court to believe that the defendants did not have actual knowledge of this well-established right when the LIRR offered for sale and sold these ten-trip tickets with a time limit and the MTA approved and acquiesced in the offer and sale thereof. The defendants' zealous advocacy of the inherent right of the MTA to alter contracts of carriage and their acknowledged and extraordinary reliance on the well-established principle of the Union and Jones cases, supra, has convincingly established their knowledge of this right at the time these contracts of carriage were made reflected in the ten-trip tickets with a time limit. It cannot be disputed on this record that the purchasers of these tickets as the other parties to the contracts of carriage made at the time of the purchases had no voice, influence or control over the form of the tickets or the time limit provided therein. It is a reasonable conclusion on this record that the time limit was voluntarily and purposefully included in the face of and notwithstanding the well-established and inherent right of MTA as an arm of the State to alter contracts of carriage by which they now seek to defeat and frustrate the rights of the purchasers of these tickets. However just as the purchasers of these tickets who are also presumed to know the law (which in all likelihood they did not actually know) could not avoid the consequences of the exercise of the MTA's right on the grounds of ignorance of the

law, similarly the LIRR may not escape the consequences of it having knowingly and purposefully offered and sold these ten-trip tickets with a time limit in the face of and despite the aforesaid right of the MTA to alter the contracts of carriage by changes in the fare structure. The LIRR is legally committed and obligated to the contractual arrangement it entered into with two purchasers of the ten-trip tickets and cannot now avoid these obligations. The MTA which has knowingly and intentionally approved and acquiesced in these contractual obligations cannot be now heard to complain of the limitation or restriction of its inherent powers to alter the contract. This limitation and restriction of its inherent power was voluntarily and knowingly self-imposed and self-created. This Court knows of no statutory or judicial authority which precludes, prevents or prohibits the MTA from self-imposing this limitation on its rights and powers for the benefit of the public it was created to serve and waiving its exercise with respect to these ten-trip tickets during the unexpired period of the time limit it sanctioned when the tickets were sold.

For the LIRR to have offered for sale and sold these tickets with a time limit with knowledge of the MTA's rights and for the MTA to have approved and acquiesced as it did, with the intention of their respectively relying, if the occasion required it as in the case at hand, on the MTA's inherent right to alter the terms of the contract and thereby nullify the purchasers' rights by terminating the railroad's obligation to provide passage at the discounted fare, would in effect

constitute a deceptive practice which this Court would not and could not countenance, condone or excuse. Even though in the papers before this Court some of the plaintiffs have charged such a deceptive practice, this Court prefers to believe that by the well-established practice of the LIRR's sale of ten-trip tickets with a time limit and of the MTA's approved and acquiescence therein these defendants voluntarily and knowingly intended to limit the exercise of the MTA's powers. Accordingly and for these reasons the contracts of carriage entered into by the railroad with each of the purchases of these ten-trip tickets with a time limit are so construed.

Inasmuch as the LIRR did not in the first instance request the action taken by the MTA with respect to the unused and unexpired ten-trip tickets, it is reasonable to infer that except for the MTA's mandate the LIRR would not now have sought to repudiate these contracts and thereby terminate their contractual obligations as they have not sought to do in the past following earlier changes in the fare structure with the MTA's approval. Apart from the deficiency noted earlier as to the absence of a public hearing, on the MTA's enlargement of the LIRR's request, the MTA's insistence that the LIRR repudiate its contractual obligations with the purchasers of ten-trip tickets would be unconscionable and not legally or morally justifiable in the light of the MTA's self-imposed limitation on its exercise of its inherent powers.

Opinion

It was in obvious reliance on the time limit provided thereon that prompted the purchases in advance of the ten-trip tickets which the defendants now seek to prevent the purchasers from using. Keeping in mind the substantial number of users of these tickets and the substantial sums which the railroad, with the approval and acquiescence of the MTA, accepted in advance of its required performance, the defendant MTA is now estopped from mandating a repudiation of these contracts by the LIRR and now insisting on its absolute exercise of its right to terminate the railroad's obligations thereunder. Since there was no known requirement to provide for a time limit, the railroad would have been well within its rights, to have sold these tickets without the time limit after it had sought and before it had received approval for the elimination of the ten-trip tickets. There was nothing to prevent, preclude or prohibit the MTA from so advising or directing the LIRR. It is inconceivable that the railroad and the MTA did not know, even before the submission of the railroad's formal request for the changes, of its intention to request the elimination and that they could not have anticipated its approval and prevented the sale of a substantial number of tickets they do not now want to honor by the removal of the time limit. The removal of the time limit would conceivably have curbed these sales, substantially and the railroad would have thereby minimized its claimed loss of needed revenues. There was no statutory, judicial or regulatory mandate which prohibited or proscribed the removal of the time limit since it had been voluntarily provided by the LIRR.

Opinion

For these reasons, this Court holds and finds that the unused ten-trip tickets and the portions thereof which were sold by the LIRR and for which it received payment of the prescribed fares and with respect to which the time limit imprinted thereon has not expired are valid and existing contracts as between the LIRR and the bearers of said tickets or receipts given upon the refund of such tickets.

The Court is mindful that the usually appropriate remedy for a breach of contract is an action at law for damages. To compel the holders of these tickets to resort to this remedy and to subject them to the inevitable expense, inconvenience and delay involved in pursuing this remedy would be self-defeating and effectively deny to the holders of these tickets the rights for which they bargained. Such a remedy would conceivably not be any remedy at all and represent a pyrrhic triumph at best. Clearly these persons who represent a substantial number of commuters who have endured according to the well-publicized accounts of the LIRR's activities so patiently for so long so much inconvenience, delay and discomfort and who have been repeatedly disappointed in the non-fulfillment of so many promises are entitled to more than merely the right to sue the LIRR and to just another in a series of frustrating and inconvenient experiences. They are entitled to have contractual promises fulfilled and performed without the need to resort to protracted, expensive and burdensome litigation. Furthermore considering the number of claims that resort to a remedy at law would dump onto the

Court system and the inevitable burden on the courts and the public expense all of which can be avoided by granting an injunction restraining the LIRR from refusing to honor the unexpired and unused ten-trip tickets heretofore sold, the injunctive relief herein sought is granted as the more appropriate remedy under the circumstances.

The parties may settle judgment on notice and without costs and each party may apply at the foot of the judgment for such additional relief as may be necessary to implement the decision herein made with respect to the bearers of those ten-trip tickets that may have been previously refunded following the MTA's directive with respect to these tickets.

s/ Joseph Suozzi
J. S. C.

Opinion of the Appellate Division

38 A.D.2d 936, A March 3, 1972
728E

Mortimer G. Levine et al., respondents,
v. The Long Island Rail Road Company et al., appellants.

In a class action for a declaratory judgment and related relief, defendants appeal from a judgment

of the Supreme Court, Nassau County, entered March 1, 1972, which (1) declared inter alia that unused ten-trip tickets or unused portions thereof sold by defendant Long Island Rail Road (hereinafter called LIRR) in respect of which the time limit imprinted thereon has not expired are valid and existing contracts; (2) enjoined said defendant from refusing to honor such tickets after March 1, 1972 and (3) denied defendants' cross motion to dismiss the complaint.

Judgment modified, on the law, by (1) striking therefrom all the decretal paragraphs, except the third, which denied the cross motion to dismiss the complaint, and (2) providing, in lieu thereof that it is adjudged that (a) the portion of the fare schedule promulgated by defendants on January 21, 1972 which declared that ten-trip tickets issued prior thereto would be honored only until midnight of March 1, 1972, after which refunds on unused tickets would be made on a prorata basis reflecting the number of unused trips is valid and constitutional and (b) plaintiffs have no right to use previously purchased ten-trip tickets henceforth. As so modified, judgment affirmed, without costs.

The ten-trip tickets issued by LIRR bear the legend "Good for use * * * within One Year in addition to date of sale stamped on back." This action was commenced in an effort to obtain a declaration that it was beyond the power of defendant Metropolitan Transportation Authority (hereinafter called MTA) to adopt a passenger

fare tariff which provided, inter alia, that such tickets would not be honored beyond a certain date (March 1, 1972), after which date refunds would be made for unused portions of the ticket.

Certain of the undisputed facts appear in the opinion at Special Term. LIRR, since January 20, 1966, has been a wholly owned subsidiary of MTA. On December 20, 1971, LIRR's president reported a projected operating deficit of $52,000,000 for 1972. This deficit could be reduced to $10,400,000 if certain "save-the-fare" bills now pending before the State Legislature be adopted. LIRR requested of MTA certain fare increases and the discontinuance of the ten-trip ticket.

MTA held public hearings on the requested fare changes on January 17, 1972. On January 21, 1972 it announced a fare restructuring plan which honored the ten-trip ticket only until midnight, March 1, 1972. It found that the ten-trip ticket was difficult to administer, that it had been abused and that it is costly to the railroad's revenues.

There is obviously a justiciable controversy before us and it is one which should be determined in this action. It would be unthinkable to relegate purchasers of these tickets to an action at law for damages.

MTA was established by the Metropolitan Transportation Act (Public Authorities Law, tit. 11, §§1260 et seq.) and is a public benefit corporation vested with the power to establish fares (Public Authorities Law, §1266, subd. 3). In

this regard, the jurisdiction, powers and duties of the Public Service Commission have been extended to MTA. Indeed, we have held that the Legislature intended MTA and LIRR to be wholly exempt from Public Service Commission supervision and regulation in the performance of their functions under the Metropolitan Transportation Authority Act (Long Is. R. R. Co. v. Public Serv. Comm. of State of N.Y., 30 A.D.2d 409, aff'd, 23 N.Y.2d 852). Hence, MTA has, in effect, succeeded to the powers of the Public Service Commission with regard to the fare structure of LIRR (See Public Authorities Law, §1266, subd. 8).

MTA has statutory authority to regulate and change the fare structure. Leaving aside for the moment the issue of impairment of contract, did it properly exercise the power in this case with regard to the public hearing? Subdivision 3 of Section 1266 of the Public Authorities Law provides in part:

> "Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be established and changed only if approved by resolution of the authority adopted by not less than a majority of the whole number of members of the authority then in office and only after a public hearing."

Plaintiffs contend that the hearing was held to consider a proposal to, in effect, discontinue future sale of the ten-trip ticket and that a new hearing must be held before MTA may change its

tariff schedule so as to dishonor previously sold tickets. The rule in this regard was recently succinctly set forth in Matter of Tinsley v. Monserrat (26 N.Y.2d 110, 114). In determining whether a new public hearing was required for a tenative districting plan adopted by the interim Board of Education, the court noted that a new hearing was not necessary if the plan adopted was derived from and bore some reasonable resemblance to the one initially proposed. In Tinsley the Board, the proposer of the plan, was also the body which adopted it. That distinction is not crucial. The point at issue here is the public's opportunity to appear at a statutorily mandated hearing prior to the adoption of a proposal.

The tariff schedule adopted by MTA clearly bears a reasonable relationship to, and is derived from LIRR's proposal. LIRR, faced with a fiscal crisis, requested MTA to discontinue the ten-trip ticket. After the public hearing held on that proposal MTA announced a date, 40 days hence, from which time previously sold ten-trip tickets would not be honored. It also announced that tickets for unused trips would be redeemed on a prorata basis after March 1, 1972. The adoption of this plan, based upon the previously noted findings (that the ten-trip ticket was costly, difficult to administer and subject to abuse), was clearly within the contemplation of the proposal.

MTA's action is not an unconstitutional impairment of the obligation of contracts (U.S. Const. Art. 1, §10). In the leading case of Union Dry

Goods Co. v. Georgia Public Ser. Corp. (248 U.S. 372), the parties contracted for a five-year supply of light and electric power from the Georgia Public Service Corp. to Union Dry Goods at stipulated rates. After two years, rates charged were raised by order of the Georgia Railroad Commission after an investigation and hearing. The Supreme Court concluded that "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State" (p. 377).

The right of the State to alter a rate or fare schedule is inherent and contracts at certain rates or fares are made subject to this power to change the terms of the contract (cf. Jones v. Rochester Tr. Corp., 92 N.Y.S.2d 735, aff'd 277 App. Div. 939; Clute v. Nassau & Suffolk Light. Co., 118 Misc. 630). Indeed, all private contracts are made subject to this protective power of the State to act in the public interest (cf. Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 298, 438; Matter of Department of Bldgs. of City of N.Y. [Philco Realty Corp.], 14 N.Y.2d 291, 297-298; Guttag v. Shatzkin, 230 N.Y. 647, 650).

If this inherent right of the State may be waived at all, such a waiver would require more than the mere notation on the back of a ticket that it is good for one year. To hold that such a notation barred the exercise of the State's inherent power to alter existing rate schedules would be to deny that the State possesses such inherent power.

Plaintiffs note that this is not a case in which a regulatory agency is altering a contract made by an independent utility. Instead, MTA is altering the contract of its own subsidiary. We can sympathize with the contention of plaintiffs that MTA, which is really the owner of LIRR, is in effect regulating itself to the extent of abrogating a pre-existing contract. But the wisdom of permitting such a procedure is a question which must be addressed to the Legislature. We must and therefore do take the law as we find it. The Legislature has given MTA that authority with regard to railroad tariffs previously exercised by the Public Service Commission. The Legislature was, we must assume, cognizant of this feature of the legislation. We are here dealing with the inherent power of the State to alter fares. Insofar as plaintiffs are concerned it does not matter whether this power is exercised through the Public Service Commission or through MTA. A denial of the power to MTA to alter its subsidiary's tariff schedule would seriously impair the effect of the Metropolitan Transportation Authority Act and freeze the power of the State to adjust fares in the face of a fiscal crisis. As this is an action for a declaratory judgment, we may not dismiss the complaint, but instead must make a declaration of the rights of the parties with respect to the subject matter of the litigation (Lanza v. Wagner, 11 N.Y.2d 317, 334; Cohen v. Hockfeld, 36 A.D.2d 630; Einbinder v. Ancowitz, ___ A.D.2d ___ [2d Dept., dec. Jan. 10, 1972]).

Opinion

LATHAN, Acting P.J., SHAPIRO, GULOTTA, BRENNAN and BENJAMIN, JJ., concur.

March 3, 1972 LEVINE v. LIRR 728 E

Order of the Court of Appeals

2. No. 262. 72

Mortimer G. Levine,

Appellant,

and

Royal E. Blakeman, & ors.,

Plaintiffs,

vs.

The Long Island Railroad Company & ano.,

Respondents.

BE IT REMEMBERED, That on the 25th day of May in the year of our Lord One thousand nine hundred and seventy-two, Mortimer G. Levine, the appellant — in this cause, came here unto the Court of Appeals, by Mortimer A. Shapiro, hs attorney —, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Long Island Railroad Company & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by George M. Onken, their attorney.

Order

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Mortimer A. Shapiro, of counsel for the appellant — , and by Mr. George M. Onken, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs,

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals of
the State of New York.

Order

Court of Appeals, Clerk's Office,

Albany, July 6, 1972.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon
Clerk

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-530

MORTIMER G. LEVINE,

Petitioner,

and

ROYAL E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

against

THE LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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OCTOBER TERM 1972

No. 72-530

MORTIMER G. LEVINE,

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and

ROYAL E. BLAKEMAN, MARTIN M. GREENBERG and HENRY MITTLER,

Plaintiffs,

against

THE LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

Respondents are not dissatisified with the statement in the Petition for Certiorari.

Jurisdiction

Petitioner incorrectly states (Pet. 2)[1] that this Court's jurisdiction is based on 28 U.S.C. § 1254(1), which relates to review of decrees of the United States Courts of Appeals. The jurisdiction of this Court should properly have been invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented for Review

May a state agency, pursuant to the rate-making power delegated to it by the state legislature, require that ten-trip tickets stating that they were good for one year and sold by its wholly-owned subsidiary railroad corporation subsequent to the delegation of the rate-making power, be redeemed at any time on a pro-rata basis, when such action is taken as part of a reasonable general fare increase, which, *inter alia*, provided that that form of ticket would be honored for passage during the ensuing 40 days and abolished thereafter; and when such action is necessary in view of the extreme financial crisis of the railroad and to prevent persons of means who purchased numbers of such tickets in anticipation of the general fare increase from continuing to avail themselves of the lower rate or from reaping speculative profits on the tickets at the expense of those not so fortunately situated economically?

Constitutional and Statutory Provisions Involved

Article I, United States Constitution, Section 10, Clause 1: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

New York Public Authorities Law, § 1266, subdivision 3, provides in pertinent part: "The Authority may establish

---

[1] References to pages in the Record on Appeal are designated (R.) and to pages in the Petition (Pet.).

. . . such fares . . . as it may deem desirable for the use and operation of any transportation facility . . . operated . . . by a subsidiary corporation of the Authority. . . . Any such fares . . . shall be established . . . only after a public hearing. . . . Such fares . . . shall be established as may in the judgment of the Authority be necessary to maintain the combined operations of the Authority and its subsidiary corporations on a self-sustaining basis."

Statement of the Case

Respondents disagree with the statement of the case as presented in the Petition for Certiorari and in lieu thereof, set forth the following:

Under date of December 30, 1971, as a result of its past and projected large deficits, the Long Island Rail Road (hereinafter "LIRR") requested the Metropolitan Transportation Authority (hereinafter "MTA") to approve certain fare increases and changes in the rules and regulations of the LIRR governing the issuance and honoring of various classes of tickets. These changes constituted a complete revision of the whole concept of the fare structure of the LIRR and were designed to more equitably distribute the financial burden of operating the LIRR and to eliminate a number of abuses of tickets that had become prevalent under the old fare structure (R. 61; 64-71). As part of its request, the LIRR sought MTA approval for the elimination of ten-trip tickets (R. 65).

After the public hearing held on January 17, 1972, to consider the restructuring of the whole fare structure of the LIRR and after considering all of the relevant issues, the MTA, by resolution adopted January 20, 1972, to be effective January 21, 1972 (R. 72-95) established a date after which ten-trip tickets previously sold but not yet presented would no longer be honored for transportation. In this connection, it directed the LIRR to redeem, on a

pro-rata basis, any unpunched spaces turned in by ticket holders after the date established by the MTA for the non-honoring of the tickets for transportation (R. 90). In approving the discontinuance of the ten-trip tickets the MTA said:

> The fact is that the ten-trip ticket is difficult to administer, has been abused and is very costly to the railroad's revenues. (R. 97-98.)

Accordingly, the LIRR, immediately after the MTA announcement, commenced a practice of stamping all ten-trip tickets with a notation that the tickets were not valid after March 1, 1972, and published a fare schedule which, *inter alia,* included the following under the title of Schedule No. 14, REFUND POLICY:

> TEN-TRIP TICKETS
>
> Ten-trip tickets issued prior to the effective dates of these fare schedules will be honored only until midnight of the 1st day of March, 1972, after which, upon application, refunds will be made on the basis of the price of the ticket pro-rated to reflect the number of trips punched. (R. 62.)

Petitioner Levine, by his own admissions (R. 26-28), having learned of the proposed fare increase and cancellation of the ten-trip tickets, attempted to defeat the system by purchasing and hoarding in advance of the MTA's determination an undisclosed number of ten-trip tickets, which he intended to use subsequent to March 1, 1972.

The LIRR, in requesting this most recent fare increase and the cancellation of the ten-trip tickets, was faced with a projected deficit for 1972 of over $52,000,000, of which the requested fare increases and changes were expected to cover $10,400,000 (R. 64; 96-97). While recognizing that the elimination of the ten-trip tickets would work

some hardships, both LIRR and MTA were convinced that this step was necessary, not only to raise the badly needed revenues, but also to equitably distribute the burdens among all riders, since this class of tickets had been subject to considerable abuse and caused great difficulty in administration (R. 97-98).

On February 29, 1972, the Supreme Court, Nassau County, rendered a decision adverse to respondents and granted a permanent injunction restraining the LIRR from refusing to honor the unexpired and unused ten-trip tickets (Pet. 18a).

LIRR and MTA promptly commenced an appeal to the Appellate Division, Second Department, which on March 1, 1972, upon the application of various plaintiffs, including petitioner herein, vacated the automatic stay granted the LIRR, as a wholly-owned subsidiary of a state agency, by the New York Civil Practice Law and Rules, Section 5519(a)1. The Appellate Division, Second Department, heard oral argument on March 3, 1972, at which time briefs were filed by all parties, and that Court substantially modified the Judgment of the Supreme Court, Nassau County, and vacated that part of the Judgment requiring the LIRR to continue honoring ten-trip tickets presented for transportation (Pet. 19a). Petitioner appealed to the Court of Appeals of the State of New York, which heard oral argument on June 9, 1972, and on July 6, 1972, unanimously affirmed the Order of the Appellate Division (Pet. 26a).

Argument

It was well settled constitutional law as early as 1919 that a state may in the exercise of its police powers fix reasonable rates for public services provided by utility companies and common carriers, without unconstitutionally impairing the validity of contracts, even though the rate thus fixed would be higher than and supersede a contract

rate. *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U.S. 372 (1919).

Metropolitan Transportation Authority is the arm of the state which is empowered to regulate the fares of the LIRR, having succeeded to the powers of the New York Public Service Commission (hereinafter PSC) in regard to regulation of LIRR fares (R. 157).[2]

Petitioner argues (Pet. 12) that the legislature had not intended to vest MTA with the same rate making powers as PSC had with respect to LIRR (i.e., the power to set rates for LIRR which would supersede LIRR's contract rates), but this question has been resolved against him in the state courts, and thus presents no federal question, since this Court must accept the decision of the highest court of the state fixing the meaning of the legislation as though such meaning had been specifically expressed therein. *Knights of Pythias* v. *Meyer*, 265 U.S. 30, 32 (1924). Of course, the constitutionality of the statute as construed and applied is the question before this Court. Petitioner raises the single constitutional issue of violation of the Contract Clause of the United States Constitution (Pet. 3).

Petitioner does not argue that MTA acted unreasonably in raising LIRR's fares. Rather, petitioner's sole constitutional argument is that since LIRR is a wholly-owned subsidiary of MTA, the act of MTA in cutting short the life of ten-trip tickets[3] (thus preventing persons such as

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[2] The history of the creation of MTA and the scope of its powers over LIRR are outlined in the case of *Long Island Rail Road Co.* v. *Public Service Commission*, 30 AD 2d 409, 413-414, 292 NYS 2d 167, 171-173, aff. 23 NY 2d 852, 298 NYS 2d 65. See also the annotation, McKinney's Consolidated Laws of New York Annotated, Book 42, Public Authorities Law, § 1260; and see also §§ 1264 and 1266, subdivisions 3 and 8.

[3] Pro-rata refunds based on the unused portion of the tickets were required to be made and in actuality have been made to all those requesting them.

petitioner who had purchased these tickets in anticipation of a fare increase from continuing to avail themselves of a lower rate) amounted to the state abrogating its own contract in violation of the Contract Clause of the United States Constitution. Thus, it is petitioner's position that while the state may, in the proper exercise of its police power raise rates and thus impair contracts entered into between individuals and a private public service company, the state may not constitutionally alter rates in such a manner as to impair contracts between individuals and a wholly-owned subsidiary railroad corporation of the state's regulatory arm.

Assuming, *arguendo,* that despite the separate corporate status of LIRR, this Court were to find that the act of MTA did indeed amount to the state altering its own obligation, it does not follow that such alteration is unconstitutional. This Court held in *City of El Paso* v. *Simmons,* 379 U.S. 497 (1965), that in the proper exercise of the reserved power of a state to safeguard the vital interests of its people, a state may modify its own obligation.[4] Further, this Court in *City of El Paso* v. *Simmons, supra,* relied on cases which involved the modification of private contracts in the exercise of the police power of the state. Accordingly, one is led to the conclusion that the test of what is a valid modification of an obligation in the exercise of the police power is the same whether the state is modifying its own obligation or that of private parties.

It is clear from the line of cases represented by *Union Dry Goods Co.* v. *Georgia Public Service Corporation, supra,* that the regulation of the charges made by common carriers is an area in which the states have historically exercised the police power to safeguard the vital interests of the people, and in so doing have modified contracts with-

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[4] See also *Beer Co.* v. *Massachusetts,* 97 U.S. 25 (1877); *Stone* v. *Mississippi,* 101 U.S. 814 (1879); and *Atlantic Coast Line R.R. Co.* v. *Goldsboro,* 232 U.S. 548 (1913).

out violation of the Contract Clause. Thus, in view of *City of El Paso* v. *Simmons, supra,* it is clear that this valid exercise of the police power does not suddenly become invalid because an obligation of a wholly-owned subsidiary of the state regulatory agency is affected as opposed to a wholly private obligation.

None of the cases relied upon by petitioner sustain his position. None has anything to do with the exercise of the power to regulate rates for public services. *Fletcher* v. *Peck,* 6 Cranch 87 (1810), involved the attempt of the Georgia legislature of 1796 to annul a land grant made by the legislature in 1795. There were charges of bribery as regarded the original grant, but the original grantees had sold the property to innocent purchasers, of whom Fletcher was one, prior to the 1796 law, which was held invalid.

Sinking Fund Cases, 99 U.S. 700 (1878); *Lynch* v. *United States,* 292 U.S. 571 (1934); and *Perry* v. *United States,* 294 U.S. 330 (1935), dealt not with the Contract Clause, which applies only to state legislation, but with the similar restriction placed on the Congressional power to impair contracts by the Due Process Clause. In the *Sinking Fund Cases, supra,* the government had issued to the Union Pacific Railroad Co. bonds to finance construction of the railroad. By the terms of the loan, the company, *inter alia,* was obligated not only to pay both principal and interest with respect to the bonds at maturity but also to furnish transportation and other services to the government at reasonable rates and to apply to the payment of the bonds and interest half the compensation due to the company from the government as it was earned. Further, after completion of the railroad, it was to apply 5 per cent of its net annual earnings to the payment of the bonds. More than ten years after the issuance of the bulk of the bonds, Congress in an act of 1878 required that the government retain the whole amount of compensation due to the company as compensation for services rendered to the govern-

ment; and that the one half of the compensation withheld and not applied in liquidation of interest was to be deposited in a sinking fund established in the United States Treasury. The company was also required to pay into the fund 25 per cent of its net annual earnings. The fund was to be invested in U. S. bonds and applied to the satisfaction of the bonds loaned to the company at their maturity and of all interest paid by the government. This Court upheld the act of Congress on the grounds that it was warranted under the right of amendment reserved in the company's charter, stating at 99 U.S. 719 that it was unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved. However, in the course of its opinion, the Court did state with respect to the powers of Congress aside from the right retained to amend the charter:

> Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. *Sinking Fund Cases, supra,* at 726.

If anything, *Sinking Fund Cases, supra,* point in a direction opposite of petitioner's position, having upheld the government's action despite the dicta quoted by petitioner (Pet. 8).

Perry v. *United States, supra,* involved an attempt by Congress to invalidate by direct legislation the "gold clause" contained in certain government obligations. While the opinion of the Court found the direct invalidation unconstitutional, it went on to non-suit the plaintiff on the grounds that Congress had constitutionally made legislative changes in the currency and restricted possession and dealing in gold, so that even if plaintiff were paid in accordance with the gold clause, there was no showing that he would have been better off than being paid the face value

of the bond in the new currency. Accordingly, the opinion of the Court was that plaintiff failed to show any damages. It should be noted that in his concurring opinion, Justice Stone, the fifth Justice needed to make up the majority, expressly refused to join in the dicta quoted by petitioner (Pet. 8).

In *Lynch* v. *United States*, 292 US 571 (1933), the Court held that Congress could not cancel government war risk life insurance. However, in that case Justice Brandeis was careful to point out that the Due Process restriction against impairment of federal government obligations is not absolute, stating at pages 579-580:

> That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power. (Footnote omitted)
>
> The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power.

An example of a retroactive change in United States obligations undertaken "within the federal police power or some other paramount power" is found in *Lichter* v. *United States*, 334 U.S. 742 (1948), which sustained the power of Congress in the exercise of the war power to pass legislation which authorized the renegotiation and capture of excess profits on government contracts and subcontracts entered into prior to the enactment of the Renegotiation Act.

There is yet another reason why an impairment problem is not conceivable in the action taken by MTA. Unlike

the action of the state in *City of El Paso* v. *Simmons*, *supra*, or the action of Congress in *Licter* v. *United States*, *supra*, the action of MTA was taken pursuant to a statute enacted prior to the sale of the ten-trip tickets in question. As was pointed out by Judge Cardozo, then of the New York Court of Appeals, in the case of *People ex rel. City of New York* v. *Nixon*, 229 N.Y. 356, 361 (1920):

> The obligation of a contract is determined by the law in force when it is made (*McCracken* v. *Hayward*, 2 How. (U.S.) 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed (*Louisville & Nash. R.R. Co.* v. *Mottley, supra; Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp., supra; Producers' Transp. Co.* v. *R.R. Comm., supra*). That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force (*Lehigh Water Co.* v. *Easton*, 121 U.S. 388; *Denny* v. *Bennett*, 128 U.S. 489; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U.S. 437, 446). Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred. The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to "transform a consent that was qualified into one that is absolute" (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation.

Judge Cardozo made the foregoing statement in the course of deciding that, notwithstanding the fact that a railroad had obtained the consent of the City to operate in a street upon the condition that five cents should be the maximum fare, the Public Service Commission could nevertheless authorize a higher fare pursuant to its authority to set fares under the Public Service Law. While the statement was made with respect to the New York State Constitution's prohibition on impairment of the obligation of contracts, it is, from the authorities cited, an application of federal constitutional law to that question.[5]

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[5] It should be noted that the power of the Public Service Commission to set rates for railroads was not contained in Section 66(5) of the Public Service Law as is suggested on page 13 of the petition but under Section 49 of that law. Section 66(5) relates to gas and electric corporations only.

The statute Judge Cardozo spoke of in *Nixon* was a predecessor of Section 49, specifically L. 1911, Chap. 546, and allowed the Public Service Commission to change fares of railroads "notwithstanding that a higher rate, fare or charge has heretofore been authorized by general or special statute." No mention was made of the power to change rates in contravention of contracts entered into prior to the statute. Nonetheless, Judge Cardozo stated with regard to the statute at 229 N.Y. 359:

> The question soon arose whether the new rule was retroactive and annulled existing contracts in conflict with its terms. Indisputably it annulled such contracts between carriers and passengers, or carriers and shippers (*Louisville & Nashville R.R.* v. *Motley*, 219 U.S. 467; *People ex rel. N.Y. Steam Co.* v. *Straus, supra; Postal Tel.-Cable Co.* v. *Associated Press, supra; Producers' Transp. Co.* v. *R.R. Comm., California*, 251 U.S. 228).

The undecided question under state law was whether the legislature intended to clothe PSC with the power to alter existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. Judge Cardozo pointed out at 229 NY 359-360:

> Restraint under the Federal Constitution, there certainly was none (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U.S. 539, 548; *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*,

(*footnote continued on following page*)

Accordingly, the action of MTA in setting fares for LIRR which had the effect of releasing LIRR from its contractual obligation under the ten-trip tickets was of a type which has historically and constitutionally been taken by state regulatory agencies and raises no possible question with respect to violation of the Contract Clause of the United States Constitution.[6]

The courts of New York have not, as petitioner suggests, radically changed the law of New York with respect to the impairment of the obligation of contracts[7] or violated the Federal Constitution by opening the door to any state agency to repudiate its contracts. No one could seriously contend that on the basis of the state court decisions MTA could properly order LIRR to repudiate whichever contracts it found undesirable.

Petitioner fails to realize that the contract arising from the ten-trip ticket falls into that special category of contracts regarding public service which are inherently sub-

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(footnote continued from preceding page)

supra; Postal-Tel. Cable Co. v. *Associated Press, supra; City of Englewood* v. *Denver & So. P. Ry. Co.*, 248 U.S. 294; *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79; *People ex rel. Vil. of South Glens Falls* v. *P.S. Comm., supra*)."

He then went on to dispose of the question of restraint under the State Constitution prohibition against impairing the obligation of contracts on the grounds that impairment is inconceivable when the statute pursuant to which the impairment is made is in existence at the time the contract is made.

[6] None of the thirteen state court judges who ruled on the case at bar found any Federal Constitutional problem. The single lower court judge who ruled in favor of petitioner did so on the basis of an interpretation of state law which was unanimously rejected by the five justices of the Appellate Division and the seven judges of the Court of Appeals.

[7] *McMaster* v. *State of New York*, 108 N. Y. 542, cited by petitioner involved no asserted exercise of police power, but the breach of a contract for the supply of sand stone for the construction of certain buildings.

ject to regulation and impairment in the exercise of the police power, since regulation of the rates to be charged for various public services including railroad service have time and again been found to be in the vital public interest and therefore a valid exercise of the police power. So long as the rates set are reasonable (petitioner does not contest their reasonableness), there can be no Federal Constitutional issue. *Union Dry Goods Co.* v. *Georgia Public Service Corporation, supra.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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